These are the tentative rulings for civil law and motion matters set for Tuesday, March 10, 2015, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, March 9, 2015. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances are governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. M-CV-0058999 KelKris Associates, Inc. vs. Coatney, Kyle C.

Appearance required on March 10, 2015 at 8:30 a.m. in Department 40.

2. M-CV-0062667 Champion Mortgage Co. vs. Draper, Cliff

Appearance required on March 10, 2015 at 8:30 a.m. in Department 40.

3. S-CV-0032113 Rose, Stephen, et al vs. Lennar Renaissance, Inc.

Appearance required on March 10, 2015 at 8:30 a.m. in Department 40.

4. S-CV-0032565 North Lakeshore, LLC vs. Turn-Key Construction Group, Inc.

Holdrege & Kull's Motion for Summary Judgment or, in the Alternative, Motion for Summary Adjudication

Rulings on Objections to Evidence

Plaintiff North Lakeshore, LLC's (North Lakeshore's) objection Nos. 1 and 2 are overruled. Turn-Key Construction Group, Inc.'s (Turn-Key's) objection No. 1 is overruled. Turn-Key's objection No. 2 is sustained. Holdrege & Kull, Consulting Engineers and Geologists' (H&K's) objection to Turn-Key's evidence, Nos. 1 and 2, are overruled. Objection No. 3 is sustained. H&K's objection to North Lakeshore's evidence, Nos. 1-6, are overruled.

Ruling on Motion

H&K's Motion for Summary Judgment, or in the Alternative, Summary Adjudication, is denied with respect to all causes of action set forth in plaintiff's complaint.

Summary judgment may be granted where there is no triable issue as to any material fact, and moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). Defendants moving for summary judgment bear the burden of persuasion that one or more elements of the causes of action in question cannot be established, or that there is a complete defense thereto. Code Civ. Proc. § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. If the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. *Id.*

H&K argues that each cause of action asserted against it in plaintiff's complaint, and each cause of action asserted against it in Turn-Key's second amended cross-complaint (SACC) fail because no evidence exists to establish that any damages to the subject swimming pool are attributable to H&K. H&K asserts that the damages plaintiff claims in this litigation relating to the swimming pool are the same damages and/or problems which existed prior to installation of the piers recommended by H&K. In support of this conclusion, H&K cites to deposition testimony of Kevin Freels, designated as the "person most knowledgeable" for plaintiff, deposition testimony of Steven Beveridge, an individual involved with the pool construction and maintenance, and deposition testimony and the declaration of Charles Kull, principal engineer for H&K.

The cited deposition testimony of Mr. Freels is that he believed that the pier placement could have caused additional damage to the pool, and that this belief was based on the observation that the cracks still existed in the pool, and in the same region. The cited deposition testimony of Mr. Beveridge is that after the repairs recommended by H&K, he noticed "the same main crack" in the pool "within a foot" of the initial crack. He also observed several other cracks in the same vicinity as the initial cracking. The cited deposition testimony of Mr. Kull is that he observed cracks where the previous cracks were, based on his determination that he could see where the previous cracks had been patched. In his declaration, Mr. Kull states that after the pier repair, he observed cracking in approximately the same location as previously observed, but to a far lesser extent.

None of the cited evidence is sufficient to establish that the damages plaintiff claims in the litigation are the same damages that existed prior to installation of the piers. At most, the evidence constitutes the visual observations of three individuals who do not profess to be expert witnesses. In addition, the assertion is disputed, as plaintiff submits the declaration of its expert witness, Michael J. O'Connor, who opines that the work performed at the recommendation of H&K resulted in additional cracking or damage to the pool shell. (O'Connor decl., ¶¶ 6-7)

H&K also argues that it owed no duty of care to plaintiff, as plaintiff and H&K were not in privity of contract, H&K's contract with Turn-Key was not intended to benefit plaintiff, and H&K's role on the project does not bear a close connection to the injury suffered. In this case,

the evidence, liberally construed, supports the existence of a duty of care owed by H&K to plaintiff. As noted in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, the factors for determining whether a defendant should be held liable to a third person not in privity include: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Id.*

The evidence presented to the court shows that H&K was retained to provide repair recommendations for the defective swimming pool on the property owned by plaintiff. The foreseeability of harm to plaintiff if H&K's recommendations were faulty is evident, as further damage to the pool would directly result in further cost to repair. Plaintiff has submitted expert testimony opining that the work performed at the recommendation of H&K resulted in additional cracking or damage to the pool shell, thus supporting the closeness of the connection between H&K's conduct and the injury suffered. Finally, a rule holding a consulting engineer accountable to the owner of the property upon which it performs work supports a policy of preventing future harm. *See Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573. A contractual provision disclaiming obligations to any third party does not foreclose the existence of a duty of care. *Id.* at 584.

With respect to the third party beneficiary claim asserted in the complaint, the motion is moot as this cause of action has been dismissed.

H&K's Motion for Summary Judgment with respect to Turn-Key's SACC is denied. H&K's Motion for Summary Adjudication with respect to Turn-Key's SACC is granted in part, and denied in part.

The motion for summary adjudication is granted as to Turn-Key's cause of action for breach of contract. H&K argues that the allegations of this cause of action do not demonstrate that an express contractual duty of the agreement between H&K and Turn-Key was breached. In opposition, Turn-Key does not show that its allegations of breach by Turn-Key relate to any express terms of the agreement.

The motion for summary adjudication is granted as to Turn-Key's causes of action for breach of express warranty and breach of implied warranty. The agreement between Turn-Key and H&K contained no express warranty. Rather, it clearly stated that no express warranty was included or intended by the agreement. Further, where the primary objective of a transaction is to obtain services, the doctrine of implied warranty does not apply. *Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 855-856. Turn-Key's opposition does not counter or even address these arguments.

The motion for summary adjudication is also granted as to Turn-Key's causes of action for implied contractual indemnity, contribution and declaratory relief. H&K and Turn-Key's agreement includes an express indemnity clause. By entering into a contract within an indemnity clause, Turn-Key bargained away its right to pursue H&K on equitable indemnity grounds. *Regional Steel Corp. v. Superior Court* (1994) 25 Cal.App.4th 525, 528-529. Where parties have

expressly contracted, the extent of the duty to indemnify must be determined from the contract, and not by reliance on the independent doctrine of equitable indemnity. *McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1536. Turn-Key's opposition does not counter or address this argument.

The motion for summary adjudication is otherwise denied. As noted above, H&K does not submit sufficient evidence to support its contention that no damages arose out of its work at the property, and plaintiff has submitted expert testimony to support its contention that the work performed at the recommendation of H&K resulted in additional cracking or damage to the pool shell.

Turn-Key's Motion for Order Determining Good Faith Settlement

Turn-Key's Motion for Order Determining Good Faith Settlement is denied.

Cross-defendants M.J Excavating and H&K have opposed Turn-Key's motion on numerous grounds, including that the settlement for $160,000 plus assignment of Turn-Key's claims is not within the "ballpark" of Turn-Key's share of liability for plaintiff's injuries. In determining whether the subject settlement was within the "good faith ballpark" under Code of Civil Procedure section 877.6, the court must consider several factors, including a rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, as well as the settling tortfeasor's potential liability for indemnity to joint tortfeasors. *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499; *Far West Fin'l Corp. v. D & S Co.* (1988) 46 Cal.3d 796, 816. In this case, Turn-Key has presented no evidence to establish either a rough approximation of plaintiff's total recovery, or its own potential proportionate liability. Counsel's declaration states that Turn-Key's expert has determined the cost to repair the swimming pool at between $150,000 and $200,000, but there is no declaration from this unnamed expert, nor are any other facts set forth to show the basis of this contention.

The settlement at issue contains a non-cash element, Turn-Key's assignment of any and all rights it might have against the other parties for claims arising from this action. As the court must determine the value of the consideration paid in settlement, the settling parties must establish the value of assigned rights. *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1497. Proper valuation of the assigned rights may take into consideration factors such as the maximum amount of money the assigned rights represent, a discount based on the cost to prosecute those rights to judgment, the probability of prevailing on the assigned rights, and the likelihood of collecting on the judgment. *Regan Roofing Co., Inc. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1714. In this case, Turn-Key's counsel states in his declaration that counsel for plaintiff and Turn-Key have valued the assignment at $40,000 with respect to M.J. Excavating. Turn-Key sets forth no evidence to support its statement regarding the value of the assignment, or to permit the court to evaluate the propriety of Turn-Key's valuation.

The court is unable to determine whether the settlement amount is within the reasonable range of Turn-Key's proportionate liability, and there is insufficient information to establish the settlement value. Accordingly, Turn-Key's motion is denied.

Parsons Bros. Rockeries' Motion for Good Faith Settlement

Parsons Bros. Rockeries of California, Inc. dba Parsons Walls' Motion for Good Faith Settlement is granted. Based on the standards set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiffs' injuries, and therefore is in good faith within the meaning of Code of Civil Procedure section 877.6.

5. S-CV-0034731 Safeco Insurance Company vs. Pentair Water Systems, et al

Plaintiff Safeco Insurance Company of Illinois' (Safeco's) Motion for an Order Compelling Further Responses by defendant Sta-Rite Industries is denied.

A motion to compel further responses to a request for production of documents "shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand." Code Civ. Proc. § 2031.310(b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98. Declarations containing specific facts showing the requisite good cause are required. *See Fireman's Fund Ins. Co. v. Superior Court* (1991) 233 Cal.App.3d 1138, 1141; *Grannis v. Board of Medical Examiners* (1971) 19 Cal.App.3d 551, 564. In this case, the declaration of counsel in support of the motion sets forth no facts establishing good cause to justify the discovery sought.

Safeco's request for sanctions is denied.

6. S-CV-0035089 Musso, Mark, et al vs. Nortech Waste, LLC

The Demurrer to Complaint is continued to April 2, 2015 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

7. S-CV-0035653 FG Sorelle, LLC vs. Nunes, Thomas Tobias, et al

The Demurrer to Complaint was continued to April 14, 2015 at 8:30 a.m. in Department 40. The Motion to Strike was dropped by the moving party.

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